No. 83-492

In the Supreme Court of the United States

OCTOBER TERM, 1983

MOBILE HOME ESTATES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Board properly concluded that petitioner violated Section 8(a)(5) of the National Labor Relations Act by withdrawing recognition from and refusing to bargain with a previously recognized union without having a reasonably-based good faith doubt as to the union's majority support among petitioner's employees.

2. Whether the Board acted within its discretion by ordering petitioner to recognize and bargain with the union as a remedy for petitioner's violation of Section 8(a)(5) of the Act, notwithstanding the time elapsed between the violation and entry of the order.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is reported at 707 F.2d 264. The decision and order of the National Labor Relations Board (Pet. App. A4-A94) is reported at 259 N.L.R.B. 1384.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1983. On August 15, 1983, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 21, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. 2-3.

STATEMENT

1. Petitioner manufactures and sells mobile homes at its plant in Bryan, Ohio. In March 1972, petitioner voluntarily recognized the International Union, Allied Industrial Workers, AFL-CIO and its Local 712 (the Union) as the exclusive bargaining representative of its production and maintenance employees after a majority had signed valid union authorization cards (Pet. App. A14-A15, A74; C.A. App. 63). Petitioner and the Union entered into a three-year collective bargaining agreement in November 1973. The contract contained a dues checkoff authorization clause and a provision that employees in the unit were to become members of the Union after 30 days. Checkoff authorization cards apparently were not provided until more than a year after the contract commenced, but employees eventually signed cards and union dues were deducted on a monthly basis (Pet. App. A23).

During the summer of 1976, a few months before expiration of the initial collective bargaining agreement and just prior to commencement of negotiations for a new contract, there was an upsurge of employee interest in the Union and members began to hold monthly meetings. The employees, who prior to 1976 belonged to an amalgamated local union with offices elsewhere, sought and were granted their own local by the Union's international organization. The new local elected officers, stewards and a bargaining committee in August 1976. Pet. App. A23.

Petitioner and the Union began negotiations for a new contract in October. Meetings were held on five

occasions. The Union negotiating committee rejected petitioner's final offer but agreed to submit it to a vote of the membership. Pet. App. A24. At a local meeting on November 14, 1976, that was attended by 32 employees, the company's proposal was rejected by a vote of 31 to 1.[1] A strike vote followed. The vote tally showed 28 in favor of striking, 2 opposed and 2 abstaining. Pet. App. A25. The margin was the same in two subsequent strike votes taken on November 17 and November 18 (Pet. App. A77).

On November 13, one week before the strike was to begin, petitioner's president, James Newman, interrogated employee Phyllis Hicks about her willingness to cross a picket line in the event of a strike. He also told her that the company could afford to pay higher wages if there was no union. Pet. App. A27. Hicks initially indicated a willingness to cross the picket line, but later told Newman she would not do so. Newman offered to drive her across, but Hicks repeated that she would not cross a picket line. *Ibid.* On November 19, the day before the strike, Newman told employees Sanders and Paxton that they could resign from the Union and form their own union if they wished to avoid being fined by the Union for working during the strike (Pet. App. A56-A57). Newman told a number of other employees that they could not be fined for crossing the picket line if they were not members of the Union (Pet. App. A28). Finally, Steve Miller, a supervisory employee of petitioner, told employee Gwen Mihuc on November 19 that the Union was "not any good" and cost members money, and that they should resign and form their own union (Pet. App. A51).

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[1] Petitioner employed 40 employees in its production and maintenance unit during the fall of 1976 (Pet. App. A22).

The strike lasted from November 20 to December 1, when it was terminated by a vote of the employees (Pet. App. A25). The Union made an unconditional offer to return to work on behalf of all striking employees. At least 12 of the strikers were not reinstated immediately following the strike; although some eventually returned to work, others were never asked to return. *Ibid.*

Following the end of the strike, on December 10, 1976, the Union sent a letter to petitioner requesting a list indicating each employee, his or her hiring date, address, rate of pay, and department. The Union also requested continuation of its dues checkoff and stated that it was willing to resume negotiations on December 21, 22 or 23. In response, company president Newman indicated that petitioner would no longer deduct union dues; he enclosed a list showing only amounts deducted during November. On December 17 the Union repeated its request for the information previously sought and for resumption of negotiations. That same day, petitioner's counsel wrote that he would be unable to meet on the dates proposed; he suggested that the Union call him in January 1977 to arrange a substitute date and repeated that dues would no longer be deducted, contending that the authorizations expired with the old contract. There was no further contact between the parties. The Union filed unfair labor practice charges on December 27, 1976. Pet. App. A25-A26. A complaint was issued.

2. In the proceedings before the Board, petitioner contended that it withdrew recognition from, and refused to bargain with, the Union based on its belief that the Union no longer represented a majority of its

employees.[2] According to petitioner, it had formed this belief based upon alleged union inactivity, lack of support for the strike, and employee turnover.[3] The

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[2] An administrative law judge (ALJ) conducted a hearing during May and June 1977. Following his decision in September 1978 (Pet. App. A101-A135), the Board remanded for additional findings (Pet. App. A97-A100). The ALJ retired before issuing supplemental findings. The Board subsequently approved a stipulation entered into by the parties that the case be decided by a new ALJ based on his review of the original record and briefs, and his own findings of fact and credibility resolutions independent of the decision of the original ALJ (Pet. App. A5 n.1). The new ALJ issued his decision in March 1981 and the Board substantially adopted his findings and conclusions with respect to the matters here at issue on February 4, 1982 (Pet. App. A9, A13).

[3] At the hearing before the ALJ, petitioner's president Newman gave only three reasons for refusing to bargain with the Union: 1) the Union went on strike and was without a contract at the time of the hearing; 2) the strike commenced with only a few pickets and the number dwindled during the strike; and 3) Newman had received a list of employees who had resigned from the Union (Pet. App. A74). In a post-hearing brief petitioner listed 13 reasons for its alleged doubt as to the Union's majority status (Pet. App. A74-A76): 1) the Union was voluntarily recognized in 1972; 2) it did not achieve a contract with petitioner until November 1973; 3) the contract contained a union shop clause and dues check-off provision but authorizations for dues deductions executed by employees were not provided to petitioner until June 1975; 4) employees did not establish their own local until 1976; 5) less than a majority of employees, on average, attended union meetings in 1976; 6) union officers were appointed rather than elected; 7) four of the seven local officers resigned from the union during negotiations or before the strike; 8) 13 employees signed a document indicating their resignation from the union, a copy of which was provided to petitioner's president; 9) 13 or 14 union members worked during the strike; 10) the strike lasted for only seven workdays and

ALJ, whose decision was adopted by the Board, found that petitioner's purported reasons, "taken singularly or considered together," did not support a reasonable good faith doubt of continued majority support or negate the concrete evidence that a majority of employees supported the Union during and after the strike (Pet. App. A77).

The ALJ noted that petitioner's allegations of union inactivity related to events that occurred prior to the time at which petitioner refused to bargain. While considering these facts as background, the ALJ found that they "really have nothing to do with the majority status of the Union in 1976" (Pet. App. A76).

Nor did the resignations that petitioner relied upon justify its actions.[4] The ALJ found (Pet. App. A77):

> [I]n the formal strike vote taken prior to the strike by the Union, the members voted to strike by 28 to 2, with 2 voids or abstentions. The margin was nearly the same in the two other votes which took place on November 17 and 18, with more than a majority of the employees then employed voting to strike.
>
> Even if we were to grant that the 13 resignations were all authentic and continued in force, despite testimony to the contrary on two of them, it would still be mathematically clear that the

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only 10 to 12 employees attended the union meeting terminating the strike; 11) the company did not meet with or make concessions to the Union during the strike; 12) only 14 of 40 bargaining unit employees had more than six months of service with the company in November 1976, and almost all of them worked during the strike; and 13) petitioner's work force historically experienced high turnover and fluctuated widely in size.

[4] See page 5 note 3, *supra*.

> Union represented a majority of the employees at the time of the strike. There is no evidence which credibly demonstrates a shift of employee sentiment to opposing the Union during or after the strike. The employees who did not resign from the Union must, under the present evidence, be presumed to still have supported the Union during and after the strike.

The Board found that petitioner's refusal to bargain and to provide information requested by the Union violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), and directed petitioner to recognize and bargain with the Union (Pet. App. A4-A9, A91, A93).

3. In a brief per curiam opinion the court of appeals found that the "decision of the administrative law judge * * * reflects a thorough and conscientious canvassing of the record" and that the Board correctly decided the issues pertinent here (Pet. App. A3). The Court upheld the Board's finding that petitioner had unlawfully refused to bargain with the Union and enforced the Board's bargaining order, rejecting petitioner's contention that the order to bargain should not be enforced because of the time elapsed between the events that gave rise to the proceeding and the issuance of the order (Pet. App. A3).[5]

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[5] The Board had also found that petitioner violated Section 8(a)(1) of the Act by disparaging the Union and urging employees to resign and form their own union, by interrogating employees concerning their willingness to cross a picket line, and by telling employees that petitioner could afford to pay better wages if they did not have a union (Pet. App. A8, A91-A92). Petitioner did not contest these findings in the court of appeals, and they are not before this Court.

In addition, rejecting the ALJ's recommendation to this extent, the Board had found that petitioner violated Section

ARGUMENT

1. Petitioner does not dispute the settled propositions that majority support is presumed to continue following certification or voluntary recognition of a union, that absent unusual circumstances the presumption is irrebuttable for a period of one year, and that the presumption may thereafter be overcome only if the employer shows that the union actually lacked majority support or that the employer had a reasonably-based good faith doubt of majority support at the time of the refusal. See *Bellwood General Hospital* v. *NLRB*, 627 F.2d 98, 102 (7th Cir. 1980); *NLRB* v. *Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *NLRB* v. *Windham Community Memorial Hospital*, 577 F.2d 805, 811 (2d Cir. 1978).[6] Nor does petitioner dispute

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8(a)(3) and (1) of the Act by refusing to reinstate two strikers upon their unconditional offer to return to work (Pet. App. A7-A8). The court of appeals found that the Board's conclusion was unsupported by the record and denied enforcement of that portion of the Board's order directing that an offer of reinstatement be made to the two employees (Pet. App. A3). The reinstatement issue is not before this Court.

[6] A similar presumption of majority status, undisputed by petitioner and equally applicable here, arises when an employer and union enter into a collective bargaining agreement of three years or less duration. *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272, 290 n.12 (1972). Absent special circumstances, the presumption is irrebuttable for the duration of the agreement and is rebutted upon expiration of the agreement only by a showing that the union is in fact in the minority or that the employer has a reasonably-based good faith doubt of its majority support. *Bellwood General Hospital*, 627 F.2d at 102; *Pioneer Inn Associates* v. *NLRB*, 578 F.2d 835, 838-839 (9th Cir. 1978).

Petitioner does not contend that the Union actually lost its majority status (see Pet. 5-6, 17).

the equally settled rule that the employer's good faith doubt must be proved by evidence of objective facts " 'sufficient * * * to cast serious doubt on the Union's majority' " (*Bellwood General Hospital*, 627 F.2d at 102 (quoting *Tahoe Nugget, Inc.*, 584 F.2d at 297 n.13); see also *Orion Corp.* v. *NLRB*, 515 F.2d 81, 85 (7th Cir. 1975)). Rather, petitioner contends that the Board, with the endorsement of the Sixth and Ninth Circuits, actually requires an employer in all cases to prove that a union has in fact lost majority status, and improperly refuses to consider the cumulative weight of individual factors relied upon in asserting reasonable good faith doubt (Pet. 9-13). There is no merit to these contentions.

a. Contrary to petitioner's assertion (Pet. 9, 14-16), the decision of the Board and court of appeals in this case and decisions of the Ninth Circuit in other cases do not require an employer to prove *actual* lack of majority in order to establish reasonable doubt. The Board and all circuits clearly distinguish between an employer's proof of facts creating a reasonable doubt as to a union's continued majority status and proof of actual loss of majority status, while recognizing the legal efficacy of each. See, *e.g.*, *N.T. Enloe Memorial Hospital*, 250 N.L.R.B. 583, 588 (1980), enforced, 682 F.2d 790 (9th Cir. 1982); *Cain's Generator & Armature Co.* v. *NLRB*, 628 F.2d 933, 934 (6th Cir. 1980); *NLRB* v. *Tahoe Nugget, Inc.*, *supra*; *Terrell Machine Co.*, 173 N.L.R.B. 1480, 1480-1481 (1969), enforced, 427 F.2d 1088 (4th Cir. 1970). In proving reasonable doubt, however, an employer must produce objective evidence that is "clearly referable to a lack of majority support" (*Tahoe Nugget, Inc.*, 584 F.2d at 305 n.46), and may not rely solely on a series of ambiguous inferences. *Id.* at 305

& n.46; *Orion Corp.* v. *NLRB*, 515 F.2d 81, 85 (7th Cir. 1975).

The Board did not require petitioner to prove that the Union in fact lacked majority support in this case. Rather, the Board simply found that the facts upon which petitioner relied in refusing to bargain were not sufficient to support a reasonably based good faith doubt and accordingly did not justify petitioner's action (Pet. App. A76-A79).[7] Nor is there merit to petitioner's claim (Pet. 10-14) that the Board refused to consider the totality of the evidence in determining whether petitioner had a reasonably-based good faith doubt of the Union's continuing majority status. The administrative law judge expressly analyzed all of petitioner's asserted justifications "taken singularly or considered together" (Pet. App. A77).

Petitioner's claim accordingly amounts to a disagreement with the Board (and the court of appeals) as to the factual conclusions to be drawn from the evidence in the record. The court below found that the "decision of the administrative law judge in this case reflects a thorough and conscientious canvassing of the record" (Pet. App. A3) and correctly concluded that substantial evidence supports the Board's finding

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[7] Petitioner contends (Pet. 17) that the Board's approach requires an employer to poll its employees in order to prove actual lack of majority, and that such polling "invariably" would be an unfair labor practice. Because neither the Board nor the courts require proof of actual loss of majority support this contention is irrelevant. Moreover, questioning by an employer as to employees' support for a union is not necessarily an unfair labor practice. Such polling is lawful if it meets criteria designed to assuage employee fears of reprisal. *Struksnes Construction Co.*, 165 N.L.R.B. 1062 (1967).

that petitioner did not have a reasonable good-faith doubt of the Union's majority support. Review of that fact-bound determination is not warranted. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

b. In any event, there is ample support in the record for the Board's conclusion that petitioner failed to demonstrate a reasonably-based good faith doubt.[8] As the Board found, the period just prior to petitioner's refusal to bargain was one of great union activity (Pet. App. A23-A25). The factors that petitioner invoked to show union inactivity were too remote in time from the refusal to bargain to support a good faith doubt at the pertinent time (Pet. App. A76).

A clear majority of unit employees voted to strike in each of three strike votes, and all but about 11 employees honored the picket line (Pet. App. A25, A76-A77). Although some employees did not honor the picket line, neither the refusal of some employees to strike nor the return of striking employees to work justifies withdrawal of recognition from the Union. Failure to support a strike does not necessarily show lack of support for the Union. See Pet. App. A78; *Cantor Brothers, Inc.*, 203 N.L.R.B. 774, 779 (1973); *Coca-Cola Bottling Works, Inc.*, 186 N.L.R.B. 1050, 1053 (1970). As the ALJ found, "[t]here are any number of reasons why employees would work during

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[8] As noted above (page 5 note 3, *supra*), petitioner gave only three reasons for refusing to bargain in testimony before the ALJ. Petitioner's failure to mention any of the other factors upon which it purported to rely until it filed a post-hearing brief with the ALJ itself tends to show that the latter are mere post hoc rationalizations. See *NLRB* v. *Cornell of California, Inc.*, 577 F.2d 513, 518 (9th Cir. 1978).

a strike even though they supported a union" (Pet. App. A78).

Petitioner contends (Pet. 12-13) that it had a reasonably-based doubt of the Union's majority because 13 employees signed a document resigning from the Union and showed it to company president Newman (Pet. App. A75). As the Board found, petitioner violated Section 8(a)(1) of the Act by disparaging the Union and urging employees to resign and form their own union (Pet. App. A91-A92). Where, as here, an employer is guilty of having solicited union resignations and other conduct designed to undermine the Union, the employer cannot properly rely on evidence of resignations to support its asserted doubt as to the Union's majority. See *Garrett Railroad Car & Equipment, Inc.* v. *NLRB*, 683 F.2d 731, 737-738 (3d Cir. 1982); *Bellwood General Hospital*, 627 F.2d at 102; *NLRB* v. *Frick Co.*, 423 F.2d 1327, 1333 & n.13 (3d Cir. 1970). Even if the authenticity of all 13 resignations is assumed,[9] given the size of the work force, the margin of the strike vote, and the small number of employees who crossed the picket line, these resignations did not deprive the Union of a majority at the time of the strike and did not give petitioner cause to believe that the Union had lost majority support. There was no evidence presented that would have warranted petitioner's concluding that the majority who did not resign no longer supported the Union during or after the strike. Pet. App. A77.

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[9] The ALJ assumed the authenticity and continuing efficacy of all resignations, although he noted that "[o]ne or two of the employees" who had resigned stated that they had withdrawn their resignations and did not work during the strike (Pet. App. A76-A77).

Finally, petitioner contends that substantial turnover among its employees gave rise to doubt concerning the Union's continued majority status. Petitioner offered no evidence to substantiate its assertion of turnover; its undocumented assertion should not be accepted as a substitute at this late stage of this litigation. But even if it were factually founded, petitioner's contention is legally flawed. Absent credible evidence to the contrary, new employees are presumed to support an incumbent union in the same ratio as those whom they replace. *Fotomat Corp.* v. *NLRB*, 634 F.2d 320, 327 (6th Cir. 1980); *Pioneer Inn Associates* v. *NLRB*, 578 F.2d 835, 840 (9th Cir. 1978); *NLRB* v. *Washington Manor, Inc.*, 519 F.2d 750, 753 (6th Cir. 1975).[10]

c. Contrary to petitioner's contention, the court of appeals' brief per curiam opinion does not adopt the rule that an employer must show actual loss of majority status to privilege a refusal to bargain with a previously recognized union.[11] The Board did not re-

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[10] It is not alleged, and the record does not reveal, that any new employees in this case were replacements for strikers. The case accordingly does not present any of the special considerations present in such situations. Compare *Pennco, Inc.* v. *NLRB*, cert. denied, No. 81-2103 (Nov. 8, 1982) (White, J., dissenting).

[11] Even if, as petitioner claims (Pet. 16), the Ninth Circuit adheres to such a rule, this case obviously would not provide an appropriate vehicle for further review. But the Ninth Circuit has not adopted any such rule. *NLRB* v. *Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), cert. denied, 451 U.S. 906 (1981), upon which petitioner relies, plainly recognizes that an employer's reasonably-based good faith doubt as to the union's majority status justifies refusal to deal with the union even absent a showing of actual loss of majority. 623 F.2d at 577, 578-579. Read in context, the passage quoted by peti-

quire petitioner to demonstrate actual loss of majority support (see pages 9-10, *supra*), and the court of appeals merely upheld the Board's decision. Accordingly, this case presents no conflict among the circuits as to whether an employer's reasonably-based good faith doubt of a union's majority status is a sufficient basis for a refusal to bargain.

Nor, contrary to petitioner's contention (Pet. 18-24) is the result here contrary to decisions of the Fifth, Seventh and Eighth Circuits. Those cases are factually distinguishable from the present case, and reflect no difference in the governing legal principles. In each of those cases, unambiguous, unequivocal evidence supported a reasonable doubt of majority status. In *Bellwood General Hospital* employees made repeated statements to the employer's personnel director and to the union that the union "had no support" among, and did not represent, the employees (627 F.2d at 101-102). Indeed, in a letter to employees the union had conceded that it had no support at the hospital (*ibid.*). In addition, the union had been dere-

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tioner (Pet. 16) reflects only that the indicia that an employer asserts to be the basis of his doubt must be sufficient to support the belief that the union had actually lost its majority support; it is not enough that the employer have reason to believe that some erosion of union strength has occurred. Petitioner's reading of *Silver Spur Casino* obscures the important distinction between the indicia that an employer relies upon in withdrawing recognition based upon doubt as to the union's majority status and the formal evidence, presented before the Board, that a union did not in fact have majority support at the time recognition was withdrawn. It is the former that the Ninth Circuit stated must "indicate that union support ha[s] declined to a minority" if reasonably-based doubt as to the union's majority status is to be found. *Silver Spur Casino*, 623 F.2d at 579.

lict in its representational and grievance duties during an entire contract term (*id.* at 104).

In *National Cash Register Co.* v. *NLRB*, 494 F.2d 189, 191, 194 (8th Cir. 1974), employees on two occasions filed decertification petitions supported by 30% of the membership. The court noted that other evidence—such as turnover and a low number of checkoff authorizations—was ambiguous, but concluded that the employer "could properly base a good faith doubt of majority status upon the filing of [the] decertification petitions" (*id.* at 195). Here, however, petitioner was guilty of soliciting resignations from the Union (see page 3, 7 note 5, *supra*). It accordingly cannot now rely on resignations it sought to procure to justify its doubts concerning the Union's majority. *Bellwood General Hospital*, 627 F.2d at 102; *Frick Co.*, 423 F.2d at 1333 & n.13. Moreover, the document shown to president Newman here was not the equivalent of a formal petition filed with the Board to begin proceedings to decertify. There is no evidence that petitioner's employees wished to have their union decertified.

Finally, in *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F.2d 720 (5th Cir. 1978), a large number of strikers were replaced and strikers who returned to work resigned from the union following a strike in which replacements were victims of picket line violence. In addition, the union conceded to the employer that as many as 50% of the strikers would not be returning to work. The court found these to be unusual circumstances that overcame the usual presumption of continuing union support among replacements. 584 F.2d at 728-729.[12]

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[12] The cases cited in footnotes 2-5 of the Petition (at 10-13) also involve facts stronger than those involved here. Each con-

2. It is well-settled that the Board has broad discretion to issue a bargaining order as a remedy for an employer's refusal to bargain. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 612 & n.32 (1969). Petitioner contends (Pet. 24-26), however, that, because of the delay in the Board's disposition of this case and alleged turnover among employees (see page 13, *supra*) enforcement of the Board's bargaining order is inappropriate here. But the lapse of time in this case is primarily attributable to the retirement of the ALJ originally designated to hear this case before he had rendered a fully dispositive decision. See page 5 note 2, *supra*. These circumstances afford no reason to immunize petitioner against the

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tains evidence unambiguously referable to a lack of majority support. See *NLRB* v. *Triplett Corp.*, 619 F.2d 586, 586 (6th Cir. 1980) (acknowledgement by union officers of diminished support and a steady decline in grievances); *National Car Rental System, Inc.* v. *NLRB*, 594 F.2d 1203, 1206 (8th Cir. 1979) (entire workforce replaced by strike replacements and no effort by union to contact new employees); *Dalewood Rehabilitation Hospital, Inc.* v. *NLRB*, 566 F.2d 77, 80 (9th Cir. 1977) (numerous decertification petitions and an employee vote in which majority voted to withdraw union shop authority); *Ingress-Plastene, Inc.* v. *NLRB*, 430 F.2d 542, 546 (7th Cir. 1970) (union was derelict in its duties regarding grievances and safety issues, and union representative conceded union represented less than a third of unit employees); *NLRB* v. *Laystrom Manufacturing Co.*, 359 F.2d 799, 800-801 (7th Cir. 1966) (union's conduct during bargaining cast doubt on its majority support); *Hirsch* v. *Pick-Mt. Laurel Corp.*, 436 F. Supp. 1342, 1357 (D.N.J. 1977) (factors included evidence of widespread discontent with union, fact that no employees ever voted for or otherwise indicated support for union representation, and fact that union was unsuccessful in soliciting authorization cards in response to employer's petition for election).

consequences of its unlawful refusal to bargain. Significantly, petitioner makes no claim that a bargaining order would for any reason be unfair to it. Moreover, petitioner's professed concern for the rights of its present employees is not anchored upon any facts that suggest that those employees do not wish to be represented by the Union. In any event, petitioner's employees are not without recourse should they wish to terminate representation by the Union, for they may file a petition for decertification after the collective bargaining process has been allowed to function for a reasonable period. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702, 705-706 (1944).

The decision below does not conflict with *Peoples Gas Systems, Inc.* v. *NLRB*, 629 F.2d 35 (D.C. Cir. 1980). In *Peoples Gas*, employees decisively repudiated their union in an election held between the employer's unlawful refusal to bargain and the Board's issuance of a bargaining order. Relying expressly on that fact, the court of appeals found that issuance of a bargaining order was an abuse of discretion because it disregarded a clear indication that the employees no longer supported the union. 629 F.2d at 50. Although the court noted the passage of time and employee turnover between the violation and entry of the bargaining order, the basis for the court's decision that a bargaining order remedy was inappropriate was that the order was imposed against the clear wishes of the employees. Indeed, the court stated: "If there is no evidence other than mere passage of time to suggest the employees no longer support the Union, the interest in restoring a previously established and wrongfully disrupted bargaining relationship would perhaps override the possibility that employee sentiment had changed" (*id.* at 50). Here, peti-

tioner has adduced no evidence to suggest that its employees no longer support the Union. The court below therefore had no occasion to discuss the appropriateness of a bargaining order remedy in a situation such as that presented in *Peoples Gas*. And there is no reason to believe that the District of Columbia Circuit would have reached a different result from the court below in this case. Further review accordingly is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

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